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7
8 **UNITED STATES DISTRICT COURT IN AND FOR**
9 **THE NORTHERN DISTRICT OF CALIFORNIA**

10 HOUTAN PETROLEUM, INC.) CASE NO. 07-CV-5627 SC
11)
11 Plaintiff,)
12 vs.) PLAINTIFF, HOUTAN PETROLEUM, INC.'S,
12) TRIAL BRIEF
13)
13 CONOCOPHILLIPS COMPANY, a Texas) Trial Date: August 18, 2008
14 Corporation and DOES 1 through 10,) Time: 10:00 a.m.
14 Inclusive) Courtroom: 1
15) Before: Hon. Samuel Conti
15 Defendants.)
16)
16 _____)

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1 **1. SUMMARY OF FACTS AND ARGUMENT**

2 In light of the Court's findings contained in its Order Granting In Part and Denying In Part
3 Defendant's Motion For Summary Judgment, filed on July 21, 2008, Docket No. 103, plaintiff
4 Houtan Petroleum, Inc. ("Houtan") amends its previous trial brief (Docket No. 76) with discussion
5 regarding remaining issues as follows:

6 On September 18, 2007, ConocoPhillips sent Houtan Petroleum a "NOTICE OF
7 TERMINATION" allegedly "pursuant to the requirements of the Petroleum Marketing Practices Act
8 ("PMPA")."

9 On October 18, 2007, Houtan Petroleum notified ConocoPhillips in writing that it will be
10 acquiring possession of the premises from the landlord and demanded that ConocoPhillips forward
11 a bona fide offer to sell its equipment and improvements.

12 On October 22, 2007, in response to Houtan Petroleum's request for a bona fide offer,
13 ConocoPhillips sent Plaintiff an "OFFER TO SELL IMPROVEMENTS" along with a Bill of Sale
14 for \$340,000.00, also allegedly "[i]n accordance with the provisions of the Petroleum Marketing
15 Practices Act, 15 U.S.C. Section 2801 et seq."

16 The same equipment and improvements that ConocoPhillips offered to sell for \$340,000.00
17 was appraised by an MAI appraiser, Andrew C. Plaine, retained on Plaintiff's behalf for a total
18 amount of \$145,000.00, as of the time of ConocoPhillips' offer. Consequently, the evidence will
19 show that ConocoPhillips' offered price exceeded the fair market value of the property by seventy-
20 four percent (74%).¹

21 Effective November 1, 2007, Plaintiff began leasing the premises directly from the landlord.

22 Pursuant to the Court's Order (Docket No. 103), ConocoPhillips must prove that it's offer was
23 "bona fide," in that it approached fair market value at the time it was made. If the trier of fact
24 determines that ConocoPhillips' offer did not approach fair market value, then the Court must find that
25 ConocoPhillips failed to comply with the PMPA in its termination of Plaintiff's franchise.

26 Although ConocoPhillips has filed three Counterclaims against Houtan Petroleum, each

27
28 ¹ Calculated by subtracting appraised value of \$145,000.00 from ConocoPhillips' offer
of \$340,000.00 and dividing \$145,000.00 by the difference of \$195,000.

1 counterclaim is based on California state law, rather than the PMPA. Although the Court refrained
2 from making a conclusive finding on the issue, it indicated that if ConocoPhillips is successful in
3 proving that its offer was “bona fide,” it may be entitled to recover “damages resulting from Houtan’s
4 continued use of Conoco’s equipment and improvements.” (Order, Docket No. 103, p. 20 of 20, ln.6-
5 9).

6 Regardless, it cannot be reasonably disputed that if ConocoPhillips fails to prove that its offer
7 was “bona fide” then it may not recover any damages because of its failure to comply with one of
8 its material obligations under the PMPA. Moreover, nothing in the franchise and lease agreement
9 between Plaintiff and ConocoPhillips entitles it to collect any rental value for its equipment after
10 termination, nor does any agreement between the parties specify what such rental value should be.
11 Additionally, nothing in the PMPA entitles ConocoPhillips to collect any rental value for its property
12 after termination of the franchise relationship and ConocoPhillips has not cited any law to the contrary.
13 Under the PMPA, ConocoPhillips is required to make a bona fide offer as a condition precedent to its
14 rights vis a vis the property. If ConocoPhillips is found to have satisfied such requirement, Plaintiff
15 will have the opportunity to purchase the equipment and improvements at the offered price of
16 \$340,000. If, however, Plaintiff prevails on the merits, ConocoPhillips will be found to have failed
17 to comply with the PMPA and would therefore not be entitled to collect any rental value for its
18 equipment and improvements, which it was required to offer for a price that approaches fair market
19 value. Instead, ConocoPhillips will be required to make another offer to Plaintiff for a price that does
20 approach fair market value. Only if Plaintiff eventually rejects a bona fide offer from ConocoPhillips
21 to sell the items for a price that approaches fair market value will ConocoPhillips have the right to
22 remove its items.

23 **2. SUMMARIZED PROCEDURAL HISTORY**

24 On November 5, 2007, Plaintiff filed the instant action along with an application for a
25 Temporary Restraining Order and Preliminary Injunction. Although the Temporary Restraining Order
26 was initially granted, Plaintiff’s application for a Preliminary Injunction was denied pursuant to the
27 Court’s Order dated November 16, 2007.

28 On December 21, 2007, ConocoPhillips filed its Motion to Dismiss Houtan Petroleum’s

1 Complaint under Rule 12(b)(6). On the same day, ConocoPhillips filed an Application for Writ of
2 Possession and Preliminary Injunction to recover its equipment and improvements prior to trial of the
3 matter.

4 On January 11, 2008, the Court summarily denied both ConocoPhillips' Motion to Dismiss
5 and Application for Writ of Possession and Preliminary Injunction. On the same day, the Court
6 advanced the jury trial date previously set for June 13, 2008 to February 11, 2008.

7 On January 18, 2008, ConocoPhillips filed its Answer to Houtan Petroleum's Complaint, along
8 with three Counterclaims against Houtan Petroleum for (1) Breach of Contract, (2) Conversion and
9 (3) Unjust Enrichment.

10 On January 23, 2008, ConocoPhillips filed a Motion to Strike Plaintiff's Jury Demand, which
11 is currently pending and set for hearing before this Court on February 6, 2008.

12 On January 24, 2008, Houtan Petroleum filed its Motion to Dismiss ConocoPhillips'
13 Counterclaims, which is currently pending and set for hearing before this Court on February 6, 2008.

14 On January 29, 2008, Houtan Petroleum filed a Motion in Limine to Preclude ConocoPhillips
15 from introducing evidence of settlement discussions at trial, set for hearing on February 6, 2008.

16 On January 29, 2008, ConocoPhillips filed six Motions in Limine against Houtan Petroleum,
17 all of which are set for hearing on February 6, 2008.

18 On January 31, 2008, Houtan Petroleum filed a Motion to Strike ConocoPhillips fact and
19 expert witness designations for failure to comply with Rule 26.

20 **3. BURDEN OF PROOF**

21 Under the PMPA, the only items which Houtan Petroleum is required to establish is that there
22 has been a nonrenewal of its franchise and its damages caused by ConocoPhillips' failure to comply
23 with the PMPA. Given that there is no dispute that ConocoPhillips terminated the franchise, effective
24 October 31, 2008, the burden shifts to ConocoPhillips to prove that it has complied with all of the
25 PMPA requirements for termination of the franchise relationship. 15 U.S.C. § 2805(c).

26 Additionally, it is the franchisor who bears the burden of proving that its notice of termination
27 complies with the PMPA. *Pruitt v. New Eng. Petroleum L.P.*, *supra*, (citing 15 U.S.C. § 2805(c)).

28 ///

4. APPLICABLE LAW

The overriding purpose of the PMPA “is to protect the franchisee’s reasonable expectation of continuing the franchise relationship. [citations omitted]. Therefore, the Act is to be liberally construed consistent with the goal of protecting franchisees.” *Ajir v. Exxon Corp.* (N.D.Cal. 1994) 855 F.Supp.294, 297, See, also, *Ellis v. Mobil Oil* (9th Cir. 1992) 969 F.2d 784, 788. Further, the PMPA must be liberally construed to effect its overriding remedial purpose of protecting the franchisee from arbitrary or discriminatory acts of the franchisor. *Hazara Enterprises, Inc. v. Motiva Enterprises, LLC* 126 F.Supp.2d 1365, 1372 (2000) (citing, *Secker v. Star Enterprise*, 124 F.3d 1399 (11th Cir. 1997); *May-Som Golf Inc. v. Chevron USA*, 869 F.2d 917 (6th Cir. 1989)).

The express language of the PMPA §2802(c)(4)(C) provides that in a situation where the franchisor loses the underlying lease, a termination of a franchise relationship is not effective until, in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately **after the loss of the right of the franchisor to grant possession** (through an assignment [of an option to extend the underlying lease] pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90 - day period after notification was given pursuant to section 2804 of this title – (i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises...” 15 U.S.C. §2802(c)(4)(C).

Case law supports Plaintiff’s position that Plaintiff need not request the sale of improvements and equipment until 30 days after he “acquires possession of the leased marketing premises effective immediately **after** the loss of the right of the franchisor to grant possession.”

In *Hazara Enterprises, Inc. v. Motiva Enterprises, LLC* 126 F.Supp.2d 1365 (2000), Motiva voluntarily terminated the underlying ground lease with the landlord, Kathleen Erskine Leutze, effective November 30, 1999 pursuant to a lease term authorizing cancellation upon 180 days notice. On April 8, 1999, Motiva advised its lessee dealer, Hazara Enterprises, Inc., that it did not intend to renew its franchise agreement effective November 30, 1999. Hazara thereafter attempted to negotiate a new lease directly from the landowner, but was unable to accomplish this until November 20, 1999, when it executed a new lease with the landlord. Shortly after Hazara Enterprises, Inc. regained its right of possession of the marketing premises on December 13, 1999, Hazara asked Motiva to sell the underground fuel lines and storage tanks to it. After an evidentiary hearing, the Magistrate Judge

1 found the underground storage tank system at Hazara's station to be "potentially dangerous" and
2 recommended to grant the injunctive relief. *Id.* at 1367-1369.

3 The Court held, however, that there was "at least an issue of fact as to the timeliness of
4 Hazara's request to purchase the equipment because, as Hazara points out, it did not obtain a new lease
5 on the marketing premises at the same time it was notified of the termination of the franchise
6 relationship (April of 1999), raising a query as to whether it acquired possession of the premises
7 "effective immediately after the loss of the right of the franchisor to grant possession" within the
8 meaning of section 2802(c)(4)(C) on November 29, 1999, triggering the 30 day notification request
9 provision of the statute at that time." *Id.* at 1373. The Court went on to say, however, that this issue
10 of timeliness was a moot point at this juncture in light of the prior finding regarding the potential
11 dangerousness of the equipment. *Id.* Nevertheless, the *Hazara Enterprises, Inc.* Court recognized that
12 the time to request the sale of improvements and equipment under section 2802(c)(4)(C) did not expire
13 until after Plaintiff obtain the possession of the property, immediately upon the franchisor's loss of
14 the right to grant possession.

15 Such an interpretation is certainly consistent with the overriding purpose of the PMPA. In a
16 situation such as the one at bar, the PMPA sets forth a requirement that the franchisee make a request
17 to purchase the equipment and improvements within a specified time frame after it gains possession
18 of the property, "effective immediately" after the franchisor's loss of the right to grant same.

19 The situation that exists in the present case is even stronger in Plaintiff's favor than the one
20 that existed in the *Hazara Enterprises, Inc.* case. In the present case, there is no question that Plaintiff
21 obtained possession of the premises immediately upon ConocoPhillips' loss of its right to grant
22 possession to Plaintiff. Its only purpose in remaining on the premises is to continue operating a motor
23 fuel service station.

24 Moreover, in situations where a third party lease is not due to expire at some point in the
25 future, it would not make any sense to require a franchisee to request an offer for the sale of
26 improvements and equipment from the franchisor, within 30 days after having just entered into a
27 franchise agreement. To so hold, would also mean that the franchisor would be required to make such
28 offer "during the 90-day period after notification was given" and to hold such offer open "for at least

45 days” even though the effective date of termination may not come for months or years to come, depending on the expiration of the underlying lease. See, 15 U.S.C. §2802(c)(4)(C) and §2802(c)(4)(C)(ii). So, hypothetically, to accept ConocoPhillips’ argument would mean that in a situation where the underlying lease is not due to expire for a year, the franchisee would have to request an offer within 30 days after having just entered into the franchise and the franchisor would have to make an offer within 90 days after that, before anyone could possibly know whether the underlying lease would be renewed and before the franchisee could possibly have obtained the right to possession of the premises following the expiration of the franchise. Such a scenario simply would not make any sense. Rather, as explained above, the more logical and viable interpretation of the PMPA is that the 30 day demand for an offer need not be made until after the franchisee, acquires its right to possession from the third party landlord.

Thus, Plaintiff is entitled to a bona fide offer pursuant to the PMPA.

5. ELEMENTS OF PROOF

Under the Court’s recent Order (Docket No. 103), ConocoPhillips must prove that its offer for the sale of its equipment and improvements to Houtan Petroleum was *bona fide* in that it was made in a timely manner and approached fair market value. 15 U.S.C. § 2802(a)(1), (b)(1)(A), (b)(1)(B), (c)(4)(C), *Roberts v. Amoco Oil Co.* 740 F.2d 602, 606 (8th Cir. 1984). *Ellis v. Mobil Oil* , 969 F.2d 784, 787 (9th Cir. 1992) (quoting *Slatky v. Amoco Oil Co.* (3rd Cir. 1987) 830 F.2d 476, 485); *Arnold v. Amoco Oil Co.* (W.D. Va. 1995) 872 F.Supp. 1493, 1500.

6. PLAINTIFF’S REMEDIES

Title 15, United States Code Section 2805(a) of the PMPA provides:

If a franchisor fails to comply with the requirement of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor.

Title 15, United States Code Section 2805(b) states in pertinent part:

(1) In any action under subsection (a) of this section, the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803 of this title, including mandatory or prohibitive injunctive relief, and interim equitable relief.

The Court should grant a mandatory permanent injunction either preventing ConocoPhillips from interfering with Houtan Petroleum’s use of its improvements and equipment until it comes forth

1 with a *bona fide* offer that approaches fair market value or ordering ConocoPhillips to present Houtan
 2 Petroleum with such a bona fide offer for the sale of the subject property, improvements and
 3 equipment at a price that approaches fair market value, as demonstrated by the appraised fair market
 4 value price of \$145,000.

5 The PMPA provides that “the court *shall* grant such equitable relief as the court determines
 6 is *necessary* to remedy the effects of any failure to comply with the requirements of §2802 ... including
 7 ... *mandatory or prohibitive injunctive relief*, and interim equitable relief.” 15 U.S.C. §2805(b)(1)
 8 (emphasis added). The term “shall” indicates that injunctive relief is mandatory if the court
 9 determines it is necessary to remedy the effects of a PMPA violation. *See, Hilo v. Exxon Corp.*, 997
 10 F.2d 641, 643 (9th Cir. 1993) (“Section 2805(b)(2) of the PMPA makes the grant of preliminary
 11 injunction **mandatory** if (A) the franchisee shows that the termination or nonrenewal of its franchise
 12 raises questions that are ‘sufficiently serious’ to provide ‘a fair ground for litigation,’ and (B) the court
 13 determines that the ‘balance of hardships’ tips in favor of the franchisee.” (Emphasis added)).

14 Additionally, if Plaintiff prevails in this action, it would be entitled to recover reasonable
 15 attorney fees.

16 Section 2805(d) of the PMPA provides:

17 (1) If the franchisee prevails in any action under subsection (a) of this section, such
 18 franchisee shall be entitled—

19 (C) to reasonable attorney and expert witness fees to be paid by the franchisor,
 20 unless the court determines only nominal damages are to be awarded to such
 franchisee, in which case the court, in its discretion, need not direct that such fees be
 paid by the franchisor.

21 The general rule stated in Section 2805(d)(1)(C) is that a prevailing franchisee **shall** be entitled
 22 to reasonable attorney and expert witness fees, and the circumstance in which the award of fees is in
 23 the court’s discretion is an exception to this general rule, which must be construed narrowly. *Jones*
 24 *v. Crew Distributing Co., Inc.*, 984 F.2d 405, 408 (11th Cir. 1993). As the Ninth Circuit has stated,
 25 “The purpose of attorney’s fees is to deter franchisors from improperly contesting meritorious claims.”
 26 *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994). Consistent with the
 27 PMPA’s purpose as remedial legislation that must “be given a liberal construction consistent with its
 28 overriding purpose to protect franchisees,” various courts have awarded attorney’s fees to the

1 prevailing franchisee who stands in the same position as Plaintiff in this action. *Lippo v. Mobil Oil*
2 *Corporation*, 776 F.2d 706, 720 (7th Cir. 1985); *Ketterle v. B.P. Oil, Inc.*, 909 F.2d 425, 428 (11th Cir.
3 1990).

4 Respectfully submitted,

5 Dated: August 8, 2008

BLEAU / FOX, A P.L.C.

6 //s//

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